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Cases

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 202

EDDIE DEAN GRIFFIN,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The decision and opinion of the Supreme Court of California is reported in 60 Cal.2d 182, 32 Cal.Rptr. 24, and 383 P.2d 432.

JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3). Petition for a Writ of Certiorari to the Supreme Court of California was granted on June 22, 1964.

QUESTIONS PRESENTED

1. Whether the limited comment upon, and consideration of, a defendant's failure to explain or deny evidence produced against him, whether he testifies or not, authorized by Article I, Section 13 of the Constitution of California contravenes the privilege against compulsory self-incrimination afforded by the Fifth Amendment.

2. Whether the presentation during the penalty phase of petitioner's trial of testimony concerning an assault committed by him in Mexico even though he had been acquitted of that offense in Mexico deprived him of due process of law or denied him equal protection of the law.

3. Whether the conviction is so lacking in evidentiary support as to violate due process of law.

STATEMENT OF THE CASE

On May 22, 1962, an information charging petitioner with the murder of Essie Mae Hodson on or about the 4th day of December, 1961, was filed by the District Attorney for the County of Los Angeles, State of California (CT 3).

On June 1, 1962, petitioner, represented by the Public Defender for the County of Los Angeles (as he was through his trial and his appeal to the Supreme Court of California), was arraigned and entered a plea of not guilty (CT 7).

On August 27, 1962, the information was amended to include allegations of two prior felony convictions which convictions petitioner admitted (CT 9). One was a conviction in Illinois in May, 1946, of the crime of rape and the other was a conviction in Illinois in September, 1955, of the crime of being a sexually dangerous person (CT 4). During the course of trial the second prior conviction was stricken on petitioner's motion (CT 78).

On October 9, 1962, the cause came on for jury trial (CT 9). Trial on the issue of guilt was had for seven days (CT 9-15) and on October 19, 1962, the jury returned a verdict finding petitioner guilty of murder in the first degree (CT 19, 77).

Trial on the issue of penalty commenced on October 24, 1962, and was had for four days (CT 78-81). On November 2, 1962, the jury decided petitioner should suffer the extreme penalty (CT 83, 86).

The Supreme Court of California affirmed the conviction on July 18, 1963, and on August 14, 1963, denied a petition for a rehearing.

STATEMENT OF FACTS

Trial On The Issue Of Guilt.

On the evening of Saturday, December 2, 1961, petitioner Griffin encountered Eddie Seay and a friend of Eddie's named Al on a street corner and asked directions to the 41st Street Club, a nearby bar (RT 63, 101). Eddie gave petitioner the directions, and

petitioner gave him a quarter, which he and Al used to help buy a bottle of wine (RT 63, 105-107).

At about nine o'clock Eddie and Al returned to the 41st Street Club (they had been there earlier that evening), and sat in a booth with Essie Mae Hodson, the victim, and two other people (RT 64, 109-110, 113-14). Eddie had been living with Essie Mae since 1957 and referred to her as his common-law wife (RT 82, 86).

Petitioner, who was standing at the counter, was invited over to the table to join Eddie and the group (RT 64, 114). They drank wine and beer through the evening until Al left and then Essie Mae left at about one o'clock (RT 65, 120). Eddie and petitioner remained in the bar until two o'clock; Eddie was fairly intoxicated and thought petitioner was too (RT 115, 123-24). At petitioner's request for a place to stay that night, Eddie took him home to the apartment he shared with Essie Mae and told him he could sleep on a day bed in the living room (RT 66-68, 69, 117, 126). Eddie then retired to the bedroom with Essie Mae and went to sleep (RT 69, 131).

Later the noise of a struggle awakened Eddie and he went into the livingroom where Essie Mae told him, in petitioner's presence, that she had gotten up to go to the bathroom and that petitioner had put his hand over her mouth and tried to make her accept him (RT 69-71, 133, 135-37, 211).

Eddie asked petitioner to go and drink some coffee and took him down the back stairs (RT 71, 138, 142).

On the way downstairs petitioner asked if he could come back upstairs and if Eddie would talk to Essie Mae for him (RT 72, 147). Eddie refused, took petitioner outside and went back upstairs the front way, locking the door (RT 72-73, 147-48).

Five minutes later Eddie heard petitioner knocking and calling and the sound of glass breaking as petitioner let himself in through the back door (RT 73-74, 148-151). Eddie got up and put on a pair of trousers, went to the back, took petitioner by the arm and brought him downstairs (RT 74-75, 152, 154, 156-57, 159). Meanwhile Essie Mae went upstairs and called to the occupant of Apartment Number 3, a man named Tommy (RT 163-65). At the bottom of the stairs petitioner hit Eddie two or three times, causing some injuries (RT 76-77, 166-167, 218).

Eddie was able to break away and ran over to the 41st Street Club where an acquaintance named Piggy agreed to go back to the apartment building (RT 77, 174-75). They were unable to find Essie Mae (RT. 175-80) and Eddie never saw her alive again (RT 78).

At about seven o'clock the next morning, Alfredo Villasenor walked down the alley that runs behind the apartment building (RT 9, 24-25). He was looking for a piece of scrap lumber (RT 9-10, 23). In the alley was a very large trash box containing several feet of sawdust and scrap wood (RT 11-12, 376-77, 409).

Villasenor saw petitioner come out of the box, buttoning his trousers (RT 10, 11, 12, 14, 25-26, 29-34).

He asked petitioner what he was doing; petitioner said "nothing" and walked away (RT 12, 27-28). Villasenor searched around for his piece of wood and finally looked into the box. There he saw Essie Mae. There was blood on her clothing, she was trembling and apparently had suffered a severe beating (RT 12, 14, 35-36, 43, 46-47).

Villasenor called to someone working in an adjacent trailer lot who in turn called the police (RT 13). The responding officers found Essie Mae sitting on top of the sawdust in the box (RT 27-28). She appeared to be under great shock, was bleeding from the head, and could barely state her name (RT 229, 241). There was mud on her face and her clothes were wet (RT 230, 243). There was blood in the sawdust (RT 232, 237-38).

Essie Mae was taken to Central Receiving Hospital (RT 230-31, 246). She was barely conscious and unable to answer questions (RT 474, 480). There she was treated for her injuries; namely, bleeding from the left middle ear, a skull fracture, bleeding bruises on the left side of her scalp, both eyes, forehead and lips, a three-inch cut in her scalp, multiple abrasions of her ankles, hip and back, and a lack of blood pressure (RT 474-476, 486-490).

Essie Mae died the next afternoon, December 4, at about four o'clock (RT 262). The cause of her death was subdural hematoma, which had not been caused by surgery (RT 249, 267, 273). Although an examination of her genital organs failed to disclose the presence of spermatozoa (RT 274), this would not exclude

the possibility of her having had intercourse late Saturday night or early Sunday morning (RT 274-76, 349-50). The coroner testified that a woman with the extensive injuries suffered by Essie Mae (see RT 250-56, 259-62, 264, 269-72), would be in great pain and it would be very difficult for her to engage in voluntary sex relations (RT 354-55).

Police officers investigating the homicide found blood stains at the foot of the back stairs (RT 382), drag marks in the alley (RT 382-83), and blood stains and a woman's wig in the sawdust box (RT 377, 385). Essie Mae wore a wig (RT 149).

Petitioner, when he was questioned by these officers in Mexicali (RT 387), freely and voluntarily told them (RT 386) that on the evening of December 2nd he was at the 41st Street Club, where he met Essie Mae, Eddie and some other people and had a number of drinks with them (RT 388-91); that during the evening he gave Eddie a ten dollar bill with which to buy some wine and that Eddie disappeared with the change after an argument (RT 391, 392, 394-395); that Essie Mae also left and that he inquired where they lived and went there (RT 396); that Essie Mae let him in and, after some discussion, told him not to worry, that she would make good the missing change by letting him have intercourse with her (RT 398-400); that they had just begun when Eddie came in the room and started a fight in which Essie Mae joined and which continued down the back stairs and into the alley (RT 403-407, 417-418); that Eddie ran off and that Essie Mae, even though she had been hit

several times in the fight, took him to the trash box (RT 409-411) where she voluntarily engaged in sexual intercourse (RT 411:6-8, 411:26-412:1, 414:6-10). Petitioner said he left the box when he heard Villasenor, who he thought was a watchman, come by the box (RT 414-15).

Petitioner did not testify at the trial on the issue of guilt and the defense consisted in the main of testimony of witnesses who to some extent contradicted Eddie's version of the events of the Saturday evening at the 41st Street Club (RT 523-32, but see RT 541), and also his account of what happened at the club the next morning (RT 566-568).

Trial On The Issue Of Penalty.

The principal evidence produced by the prosecution related to a similar offense committed by petitioner on December 19, 1961, in Mexicali, Mexico. On Monday, December 4, petitioner left Los Angeles and travelled to Calexico where he obtained a job at a cotton compress (RT 858-63, 882). There he met a man named Willie Kerr and told him his name was Willie Fairchild (RT 728, 862). Petitioner told Kerr he did not have a place to stay and Kerr let him have a room at the house which he shared with his common-law wife, Amanda Encinas, across the border in Mexicali (RT 727-28). Petitioner stayed eight days with Kerr and Amanda (RT 689-690).

On the morning of December 19, 1961, Amanda was preparing lunch when petitioner came into the kitchen and asked for a towel (RT 691). When she took it

into petitioner's room, he grabbed her, hit and kicked her, tore her clothes off and tried to rape her (RT 691-92, 693, 707-08). He kicked her a number of times (RT 694) and so dislocated her arm that it had to be put in a cast for fifteen days (RT 695). He beat the woman severely (RT 693, 695-96, 708). Despite the beating Amanda refused to submit to petitioner (RT 696), and when Kerr arrived home petitioner jumped off the bed (RT 692).

Kerr and petitioner engaged in some sort of argument and eventually the police were called and Kerr and petitioner were taken to jail (RT 717, 722, 734, 749, 870). Petitioner was brought to trial by a Mexican court on a charge of rape and released (RT 659-60, 876-77).

In an apparent attempt to explain the absence of spermatozoa in Essie Mae's private parts (RT 274), the prosecution produced expert testimony for the proposition that the venereal disease commonly known as gonorrhea would destroy the ability of a male to produce spermatozoa (RT 684, 685). Petitioner admitted to the police officers that he had had gonorrhea (RT 784-785).

Petitioner testified on his own behalf at the penalty phase. He gave an account of the incident involving Essie Mae Hodson which roughly paralleled his story to the police officers that had been read at the trial on the issue of guilt except that he denied having intercourse with Essie Mae in the trash box (see RT 803-15). His version of the incident involving Amanda Encinas was that she had voluntarily agreed to have

sexual intercourse with him for $3.00 and that her husband had come in and given Amanda the beating (RT 868-874). He testified that he had had syphilis (RT 882). He had a prior armed robbery conviction in Michigan in 1943 (RT 798-99) and an Illinois rape conviction in 1946 (RT 799).

SUMMARY OF RESPONDENT'S ARGUMENT

I

The provisions in Article I, section 13 of the California Constitution sanctioning comment upon, and consideration of, a criminal defendant's failure to explain or deny evidence presented against him, whether he testifies or not, does not contravene the Fifth Amendment privilege against self-incrimination and indeed is perfectly consistent with recognition of the privilege.

Since its first Constitution in 1850, California has afforded to criminal defendants a privilege against compulsory self-incrimination. Since the 1934 Amendment to Article I, section 13 which added the above mentioned provision, California has sanctioned limited comment upon, and consideration of, a defendant's failure to testify as consistent with the privilege. Both in *Twining v. New Jersey*, 211 U.S. 77 (1908) and in *Adamson v. California*, 332 U.S. 46 (1947), this Court recognized that a state could reasonably conclude that a rule of law sanctioning comment upon a defendant's failure to testify was consistent with the privilege against self-incrimination.

Nor does the fact that a no comment rule is followed in the federal courts mean that a preclusion from comment on a defendant's failure to testify is a necessary concomitant of the Fifth Amendment privilege. When this Court first articulated the federal no comment rule in *Wilson v. United States*, 149 U.S. 60 (1893), it predicated it not upon the Fifth Amendment but rather upon a statute which, while making a defendant competent to testify if he so requested, declared his failure to testify was to create no presumption against him. The rule enunciated in *Wilson* was established by this Court in its supervisory rule over the federal courts and the statute there construed represented a legislative policy determination by Congress.

But a legislative policy determination regulatory of the federal courts should not be imposed by this Court upon the states as a constitutional mandate. Each state should be free, within the limitations of due process, to decide whether, as a matter of policy, it will permit, as consistent with the privilege, comment upon a defendant's failure to testify.

While a large majority of the states have concluded that comment upon a defendant's failure to testify should not be permitted, several states have concluded that such comment may and should be permitted.

And, certainly the decision by such states to permit comment cannot be characterized as illogical since, as a practical matter, juries will not be oblivious to the fact that a defendant does not testify. Indeed, those states which define in a logical manner a limited scope

of permissible consideration of this patent fact confer a benefit upon those defendants who do not testify.

II

In view of the goals of modern penology, that is that punishment should fit the offender and not merely the crime, wide latitude must be afforded to a sentencing body with regard to the type of information concerning the background and history of an offender which it may properly consider.

More specifically, in view of the significance of other criminal conduct in this regard, a state may, quite consistent with the federal Constitution, permit a sentencing body to consider evidence concerning some other crime notwithstanding the fact that the offender may have been acquitted of the other offense.

Rules of res judicata are simply not appropriate to a penalty proceeding. The fact that a defendant is acquitted of an offense does not mean that he did not commit the offense but only that the evidence was not sufficient to convince the trier of fact beyond a reasonable doubt. Such a failing in an earlier proceeding should not preclude a sentencing body from considering information necessary to it if it is to make an intelligent determination as to sentence.

ARGUMENT

I

THE PROVISION IN ARTICLE I, SECTION 13 OF THE CALIFORNIA CONSTITUTION PERMITTING COMMENT UPON, AND CONSIDERATION OF, A DEFENDANT'S FAILURE TO EXPLAIN OR DENY BY HIS TESTIMONY EVIDENCE PRESENTED AGAINST HIM DOES NOT CONTRAVENE THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

Petitioner attacks the constitutionality of the provision in Article I, section 13 of the California Constitution which permits comment upon, and consideration of, the failure of a defendant to explain or deny evidence presented against him. Since this Court has now held that the Fifth Amendment privilege against compulsory self-incrimination is protected by the Fourteenth Amendment against abridgment by the states, *Malloy v. Hogan*, 378 U.S. 1 (1964), the question left unanswered by *Adamson v. California*, 332 U.S. 46 (1947), is squarely presented by this case, namely:

> Is the privilege against compulsory self-incrimination violated by the provision in the California Constitution which authorizes limited comment upon, and consideration of, a defendant's failure to explain or deny by his testimony evidence presented in the case against him?

The language in the Fifth Amendment setting out the privilege against compulsory self-incrimination. "No person . . . shall be compelled in any criminal case to be a witness against himself," is reflected verbatim in Article I, section 13 of the California Constitution. Since its first constitution in 1850, Cali-

fornia has recognized and afforded to criminal defendants the privilege against compulsory self-incrimination so basic to the tradition of the Common Law. Calif. Const., art. I, § 8 (1850). Nor is the limited comment and consideration sanctioned by California since the 1934 Amendment to Article I, section 13, inconsistent with recognition of the privilege against compulsory self-incrimination.[1]

A. The Federal No Comment Rule Is The Product Of Statute, It Does Not Follow Necessarily From The Fifth Amendment Privilege Against Compulsory Self-Incrimination, And It Should Not Be Imposed By This Court Upon The States As A Constitutional Rule Of Law.

When this Court first articulated the federal no comment rule, it predicated it, not upon the Fifth Amendment, but rather upon a federal statute which, while conferring upon a defendant the right at his request to appear as a witness on his own behalf, also declared that his failure to so request "shall not create any presumption against him." *Wilson v. United States*, 149 U.S. 60 (1893); see also *Bruno v. United States*, 308 U.S. 287 (1939).

This statute upon which the federal no comment rule is predicated (28 U.S.C. § 3481) represents a policy decision by Congress as to the manner in which the privilege against self-incrimination is to be protected in the federal courts. *Stewart v. United States*, 366 U.S. 1, 2 (1961). But this legislative policy de-

[1]Prior to the amendment California had precluded comment on a defendant's failure to testify. *People v. Tyler*, 36 Cal. 522 (1869); *People v. Adamson*, 27 Cal.2d 478, 487, 165 P.2d 3, 8 (1946).

termination regulatory of the federal courts should not be imposed upon the states as a constitutional mandate. *Cf. Ker v. California*, 374 U.S. 23, 31-32 (1963).

In *Twining v. New Jersey*, 211 U.S. 77 (1908), this Court recognized that a state could, consistent with the privilege against self-incrimination, allow comment upon a defendant's failure to testify when it said at page 114:

> "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself, and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see Queen v. Rhodes [1899] 1 Q. B. 77; Ex parte Kops [1894] A.C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution."

Similarly in *Adamson v. California*, *supra*, while assuming for purposes of the decision that the comment sanctioned by the California procedure would, if it occurred in a federal prosecution, infringe the defendant's privilege against self-incrimination under

the Fifth Amendment, this Court said in footnote 6 at 332 U.S. 50:

> "The California law protects a defendant against compulsion to testify, though allowing comment upon his failure to meet evidence against him. The Fifth Amendment forbids compulsion on a defendant to testify. [Citations]. A federal statute that grew out of the extension of permissible witnesses to include those charged with offenses negatives a presumption against an accused for failure to avail himself of the right to testify in his own defense. [Citations]. It was this statute which is interpreted to protect the defendant against comment for his claim of privilege. [Citations]."

That a rule precluding comment upon or consideration of a defendant's failure to testify is not a necessary consequence of recognition of the privilege against self-incrimination is persuasively shown by the fact that nearly every state has felt compelled to treat specifically with the comment and consideration problem, either by constitution or statute. See generally 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2272, p. 427, fn. 2. While a large majority of the states do follow a no comment rule, the decision to do so is almost invariably predicated upon language, either in constitution or statute, which forbids comment upon a defendant's failure to testify, or forbids that any presumption or inference be drawn from such failure to testify, or which declares that a defendant's failure to testify shall not prejudice him. *Ibid; Adamson v. California, supra,* 55.

Persuasive authority for the proposition that a rule sanctioning comment and consideration is not inconsistent with recognition of the privilege against self-incrimination is also found in the decisions from those states which, while recognizing the privilege, do permit comment upon and/or consideration of a defendant's failure to testify.

Connecticut sanctions instructions to the jury on the failure of an accused to testify notwithstanding a constitutional provision that an accused shall not be compelled to give evidence against himself and a statute which provides that the neglect or refusal of an accused party to testify shall not be commented upon to the court or jury. *State v. Hayes,* 127 Conn. 543, 18 A.2d 895, 918-19 (1941). Connecticut also permits adverse inferences to be drawn from a defendant's failure to testify once the state has made out a prima facie case of guilt. *State v. Del Vecchio,* 145 Conn. 549, 145 A.2d 199, 200 (1958).

Iowa, which has no constitutional provision specifically providing for the privilege against self-incrimination, construes its due process provision as including the right against self-incrimination, see *e.g. Koonch v. Cooney,* 244 Iowa 153, 55 N.W.2d 269, 271 (1952); *State v. Height,* 117 Iowa 650, 91 N.W. 935, 936-40 (1902). And, Iowa permits comment upon a defendant's failure to testify finding sanction for such procedure in an amendment to its statutory treatment of the problem which deleted language to the effect that a defendant's failure to testify should have no weight against him and should not be the subject of

comment. *State v. Ferguson,* 226 Iowa 361, 283 N.W. 917, 918-19 (1939).

New Jersey, which also has no constitutional provision setting out a privilege against self-incrimination, has treated the privilege as one of statutory origin. See *State v. White,* 27 N.J. 158, 142 A.2d 65, 70 (1958). Yet as consistent with recognition of the privilege, it follows a rule which permits, from the failure of an accused to testify, the drawing of an inference that he could not truthfully deny the inculpatory facts adduced against him. *State v. Corby,* 28 N.J. 106, 145 A.2d 289, 295 (1958).

Ohio has a specific constitutional provision setting out the privilege against self-incrimination which also sanctions consideration by the court and jury and comment by court and counsel upon the failure of an accused to testify. Ohio Const., art. 1, § 10. This sanction for consideration and comment which is also provided for by statute has received the approval of the Ohio Court of Appeals. *Halsey v. State,* 42 Ohio App. 291, 182 N.E. 127, 128-29 (1932); *State v. Parks,* 105 Ohio App. 208, 152 N.E.2d 154, 156-57 (1957).

New Mexico has a constitutional provision to the effect that no person shall be compelled to testify against himself in a criminal proceeding. New Mexico Const., art. 2, § 15. In deciding a question virtually identical to the one now confronting this Court, the Supreme Court of New Mexico held that a court rule which sanctioned comment and argument upon the failure of an accused to testify does not violate and

is not inconsistent with the constitutional privilege against self-incrimination. *State v. Sandoval,* 59 N.M. 85, 279 P.2d 850, 852-53 (1955).[2]

Further authority for the proposition that comment upon and consideration of a defendant's failure to testify is not inconsistent with the privilege against compulsory self-incrimination is found in the Uniform Rules of Evidence and in the Model Code of Evidence, both of which sanction comment upon and consideration of the failure of an accused to testify. Uniform Rules of Evidence 23(4); Model Code of Evidence rule 201(3) (1942).

We submit that the decision as to whether or not comment and consideration is to be permitted as to a defendant's failure to testify is a policy determination which each state should be free to resolve within the bounds of due process and that a preclusion from such comment and consideration is not necessary to compliance with the Fifth Amendment privilege against self-incrimination.

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[2]This decision is representative of the realistic modern approach to this question. The Vermont Supreme Court in 1947 reached the same result after extensive analysis and comment upon some earlier cases from other states which had reached a contrary result. *State v. Baker,* 115 Vt. 94, 53 A.2d 53, 56-63 (1947). Earlier the South Dakota Supreme Court by a 3-2 decision held that a statute sanctioning comment was violative of the privilege. *State v. Wolfe,* 64 S.D. 178, 266 N.W. 116 (1936). The New Mexico Court in *Sandoval* found the South Dakota dissents persuasive. In an advisory opinion the Massachusetts Supreme Court, with one dissent, reached the same result as the South Dakota Court. *In re Opinion of the Justices,* 300 Mass. 620, 15 N.E.2d 662 (1938).

B. The Comment And Consideration Sanctioned By The California Constitutional Provision Is Narrow And Goes Only To The Weight Which May Be Afforded To Evidence Presented Against A Defendant Which He Fails To Explain Or Deny By His Testimony.

The comment and consideration sanctioned by the California constitutional provision is narrow and goes simply to the weight which may be afforded to evidence presented in the case against the defendant which he fails to explain or deny by his testimony and the failure of a defendant to testify is not affirmative evidence of any fact. *Adamson v. California, supra,* 55-58; *People v. Adamson,* 27 Cal.2d 478, 488-92, 165 P.2d 3, 8-10 (1946); *People v. Ashley,* 42 Cal. 2d 246, 268-69, 267 P.2d 271, 285 (1954); *People v. Albertson,* 23 Cal.2d 550, 584-86, 145 P.2d 7, 24-25 (1944) (concurring opinion).

The limited scope of permissible consideration is stressed by the instruction given to the jury in this case, a standard formula instruction (CALJIC No. 51, Revised), which provides as follows:

> "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably

drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. *The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.*

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." (CT 57.) (Emphasis added.)

C. A Limited Comment And Consideration Rule Such As The One Sanctioned By California Procedure Operates To The Benefit Of A Defendant In That It Takes A Patent Fact Which The Jury Will Inevitably Consider And Limits Consideration In A Narrow And Logically Appealing Manner.

That an innocent person when confronted by an accusation will tender a denial and protest his innocence is basic fact of human nature which has found expression in our system of law in many ways. Long before any question of the propriety of comment on

a defendant's failure to testify had arisen, the law recognized as part of the admission exception to the hearsay rule, silence or equivocal conduct by a person confronted with an accusation. See generally, 4 Wigmore, Evidence (3d ed. 1940) § 1071, p. 70.

This concept also finds expression in the rule followed in both civil and criminal cases which permits, from the failure of a party or a defendant to produce evidence which it lies within his power to produce, the drawing of an inference that the facts are unfavorable to his cause. *Mammoth Oil Co. v. United States,* 275 U.S. 13, 51-52 (1927); *Local 167 v. United States,* 291 U.S. 293, 298 (1934); *Interstate Circuit v. United States,* 306 U.S. 208, 225-26 (1938); see generally, 2 Wigmore, Evidence (3d ed. 1940) §§ 285-91; 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2273.

Of similar origin is the generally accepted rule of evidence which allows adverse inferences to be drawn when a party to a civil suit fails to testify and controvert evidence which has been presented against him concerning matters presumptively within his knowledge. *Snead v. United States,* 217 F.2d 912, 913-14 (4th Cir. 1954), *cert. denied* 348 U.S. 971 (1955); *United States v. Leveson,* 262 F.2d 659, 661 (5th Cir. 1959); *United States v. De Lucia,* 163 F. Supp. 36, 41 (N.D. Ill. 1957), *aff'd* 256 F2d 487 (7th Cir. 1958), *cert. denied* 358 U.S. 836, *rehearing denied* 358 U.S. 896. See generally, 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2272(1)(e), p. 439.

And, even under the federal no comment rule, a defendant in a criminal case who does take the stand may not stop short in his testimony and omit to explain incriminating circumstances and events in evidence against him without subjecting his silence in that regard to the comments and inferences which become appropriate. *Caminetti v. United States*, 242 U.S. 470, 492-95 (1917).

Recognizing the universal acceptance of the concept that silence in the face of accusation is indicative of guilt, it would be illogical to conclude other than that the fact a defendant fails to testify will be noted by the jury and that the jury will draw certain inferences from that fact. See *United States v. Di Carlo*, 64 F.2d 15, 18 (2d Cir. 1933); *State v. Cleaves*, 59 Me. 298, 8 Am.Rep. 422, 423 (1871); *Parker v. State*, 61 N.J. Law 308, 39 A. 651, 653-54 (1898); *State v. Baker*, 115 Vt. 94, 53 A.2d 53, 59-62 (1947).

Indeed, to find in the Fifth Amendment a rule which would preclude triers of fact from considering so significant a fact would be to demean the Constitution and to place it at odds with common sense. As Justice Frankfurter observed while concurring in the *Adamson* case:

> "Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which

> it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process'." 332 U.S. at 60-61.

And, if one accepts the inevitability of the fact that the jury is going to observe and give some consideration to the silence of the defendant, is it not better that the permissible area of consideration be defined for them in a reasonable and fair manner? This, as is apparent from the formula instruction set out earlier, the California procedure does. It takes a patent fact which the jury cannot help but consider and defines in a narrow and logically appealing manner that consideration which the jury may properly give to a defendant's failure to explain or deny evidence produced against him.

D. Assuming Arguendo That Comment Upon A Defendant's Failure To Explain Or Deny By His Testimony Evidence Presented Against Him Is Barred By The Fifth Amendment, Petitioner Has Shown No Prejudice Meriting Reversal.

Should this Court now conclude that comment upon a defendant's failure to explain or deny by his testimony evidence presented against him is barred by the Fifth Amendment privilege against self-incrimination, it cannot be said after a consideration of the record below and the overwhelming evidence of petitioner's guilt that he was prejudiced by the prosecutor's comments or by the court's instruction. See *Coleman v. Denno*, 223 F.Supp. 938, 944-45 (D.C.S.D.

N.Y. 1963), *aff'd* 330 F.2d 441 (2d Cir. 1964), *cert. denied* 377 U.S. 1003. A review of the record in its entirety can leave no doubt that petitioner brutally beat Essie Mae Hodson while attempting to rape her and that she died as a result of the injuries he inflicted upon her.

Petitioner has set out in a footnote in his brief (Pet. Br. 12, fn. 2) the prosecutor's comments concerning the failure of petitioner to testify and to explain or deny certain of the evidence presented against him. This phase of the prosecutor's argument was not particularly extensive, no objection was made to it at trial and it is not now suggested that it exceeded the comment permissible under California procedure. Indeed, the prosecutor told the jury that petitioner's failure to testify supplied no missing link in the prosecution case but that his failure to so testify went only to strengthen otherwise weak links in the prosecution case (RT 605-A64:25-605-A64:9). The jury was not told that they could infer petitioner's guilt from his failure to testify and had this been done, it would have constituted error under California law. *People v. MacCagnan*, 129 Cal.App.2d 100, 113-14, 276 P.2d 679, 688 (1954).

Under the California harmless error rule which is found in Article VI, section 4½ of its Constitution, it has been held that error will not be deemed reversible unless, after an examination of the entire cause including the evidence, the reviewing court is of the opinion it is reasonably probable a result more favorable to the appealing party would have been

reached in the absence of the error. *People v. Watson*, 46 Cal.2d 818, 83[illegible], 299 P.2d 243 (1956); *People v. Parham*, 60 Cal.2d 378, 385-86, 33 Cal.Rptr. 497, 501, 384 P.2d 1001, 1005 (1963). The application of this harmless error rule in evaluating the prejudicial effect of prohibited comment on a defendant's failure to testify in a state criminal trial is quite consistent with due process. *Cf. Fahy v. Connecticut*, 375 U.S. 85, 92-95 (1963) (dissenting opinion). And, the application of this harmless error rule clearly calls for affirmance of the conviction.

II

TESTIMONY CONCERNING THE ASSAULT COMMITTED BY PETITIONER UPON AMANDA ENCINAS IN MEXICO DURING THE INTERIM BETWEEN THE HODSON MURDER AND HIS APPREHENSION WAS PROPERLY ADMISSIBLE DURING THE PENALTY PHASE OF HIS TRIAL AND THE FACT THAT PETITIONER HAD BEEN ACQUITTED OF RAPE BY A MEXICAN COURT DID NOT PRECLUDE ITS USE.

Petitioner's second major contention is that it violated due process of law and denied him equal protection of the law to permit the prosecution during the penalty phase of trial to present evidence concerning the commission of an assault by him in Mexico during the interim between the Hodson murder and his apprehension because it had been judicially determined in Mexico that there was not sufficient evidence to show he had committed the offense.[3] In this regard

[3] At trial defense counsel characterized the disposition as a judgment of dismissal ordered by the court (RT 658-59).

he argues that the Mexican determination was res judicata and binding on the California courts. He also argues that the use of such evidence was basically unfair in that the jury was permitted to base its penalty verdict upon factors other than the offense charged. He further contends that so extending the scope of the penalty phase of trial is basically unfair because the ability of the prosecution to secure and present evidence adverse to a defendant far exceeds the ability of a defendant to secure and present evidence to counter that presented by the prosecution.

A. The Mexican Judicial Determination That Petitioner Had Not Committed The Offense Of Rape Did Not Preclude The Introduction During The Penalty Phase Of Petitioner's Trial Of Testimony Concerning The Facts Of Petitioner's Assault On Amanda Encinas.

Petitioner first argues the Mexican determination was res judicata and precluded the introduction during the penalty phase of his trial of evidence concerning his assault on Amanda Encinas. The question is whether the jury in carrying out its function of fixing the appropriate penalty is to be denied pertinent evidence in that regard because of a failure of proof in an earlier proceeding.[4] The California Supreme Court properly concluded that the evidence was admissible and that when penalty was the issue, rules of res judicata and collateral estoppel could not be invoked to foreclose inquiry into relevant circumstances surrounding the other offense.

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[4]It seems doubtful that the Mexican court would have dismissed the rape charge had it had the benefit of evidence concerning the attempted rape and the murder of Essie Mae Hodson by petitioner.

In *Williams v. Oklahoma*, 358 U.S. 576 (1959), this Court sanctioned consideration by the sentencing judge in fixing the penalty for a kidnaping conviction, of facts relating to the murder of the kidnap victim, an offense for which the defendant previously had been convicted and sentenced. Although discussed as a double jeopardy issue, implicit in such a holding is a rejection of the argument that res judicata precluded such consideration.

Nor does the fact that petitioner was not convicted of rape in Mexico mean that he did not commit the assault upon Amanda Encinas. As observed by the California Supreme Court, "An acquittal is merely an adjudication that the proof at the prior proceeding was not sufficient to overcome all reasonable doubt of the guilt of the accused." *People v. Griffin*, 60 Cal. 2d 182, 191, 32 Cal.Rptr. 24, 29, 383 P.2d 432, 437 (1963). This Court adopted the same reasoning in *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938), when it permitted imposition of a penalty predicated upon a deficiency in a tax return due to fraud with intent to evade taxation even though the taxpayer had been acquitted of a criminal charge of wilfully attempting to evade the tax.

Consistent with this reasoning, an acquittal of criminal charges has been held not to bar a revocation of parole based on the same factual circumstance (*In re Anderson*, 107 Cal.App.2d 670, 237 P.2d 720 (1951)), nor to bar a proceeding to forfeit a vehicle based upon the same factual circumstance (*People v. One 1950 Pontiac 2-Door Coupe*, 193 Cal.App.2d

216, 218, 13 Cal.Rptr. 916, 917 (1961); *People v. One 1950 Cadillac Club Coupe*, 133 Cal.App.2d 311, 313-20, 284 P.2d 1 [illegible], 120-24 (1955)), nor to bar a proceeding to revoke a professional license based upon the same factual circumstance (*Traxler v. Board of Medical Examiners*, 135 Cal.App. 37, 39-40, 26 P.2d 710, 711-12 (1933); *Bold v. Board of Medical Examiners*, 135 Cal.App. 29, 33-34, 26 P.2d 707, 708-09 (1933)).

To the same effect, when evidence concerning another offense is otherwise admissible on the issue of guilt as going to show a common plan, scheme, or design, the fact that the defendant may have been acquitted of the prior offense (*People v. Frank*, 28 Cal. 507, 515-18 (1865); *People v. Massey*, 196 Cal.App.2d 230, 234-35, 16 Cal.Rptr. 402, 405 (1961); *People v. Lachuk*, 5 Cal.App.2d 729, 731-32, 43 P.2d 579, 580-81 (1935)), or that charges relating to the prior offense were dismissed (*People v. Fox*, 126 Cal.App.2d 560, 569, 272 P.2d 832 (1954); *People v. Raleigh*, 83 Cal.App.2d 435, 442-43, 189 P.2d 79, 74 (1948)) does not preclude its use in evidence.

B. If The Modern Philosophy Of Penology That Punishment Should Fit The Offender And Not Merely The Crime Is To Be Effectively Implemented, A Sentencing Body Must Be Afforded Wide Latitude As To The Type Of Information Concerning The Background And History Of An Offender And Of Matters In Aggravation Or Mitigation Of Punishment Which It May Properly Consider.

Petitioner also attacks the constitutionality of the provisions in section 190.1 of the California Penal Code to the effect that during the proceeding on pen-

alty, evidence may be presented "of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty," He argues that to permit the jury to consider collateral matters in addition to the circumstances of the crime for which he is to be punished violates due process in that the jury may base its verdict "not upon the crime charged but upon the personality of the defendant and on other alleged crimes or acts not charged in any indictment or information." (Pet. Br. 17).

Consistent with the current philosophy of penology that punishment should fit the offender as well as the crime, this Court has recognized the significance of evidence concerning the individual, his history and background to the imposition of an appropriate sentence. *Williams v. New York,* 337 U.S. 241 (1949); *Williams v. Oklahoma, supra.* In a capital case which placed in issue the propriety of consideration by the sentencing judge of information acquired from probation reports and out of court sources, this Court said in *Williams v. New York, supra,* at page 247:

> "Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. [footnote omitted] And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."

Logic would indicate that a jury in performing the same function of sentencing should have the benefit of information concerning the same factors. *Ward v. California,* 269 F.2d 906, 908 (9th Cir. 1959). California, while extending a wide latitude as to the factors which a jury may consider on the issue of penalty imposes evidentiary standards as to the manner of proof which are as stringent as those governing trial on the issue of guilt.

California does not permit the introduction of irrelevant evidence, that is evidence of such a nature that its prejudicial effect to the defendant outweighs its probative value. See *e.g. People v. Love,* 53 Cal. 2d 843, 856-57, 3 Cal.Rptr. 665, 672-73, 350 P.2d 705, 712-13 (1960); *People v. Hamilton,* 60 Cal.2d 105, 131-32, 32 Cal.Rptr. 4, 19-20, 383 P.2d 412, 427-28 (1963). California also limits the manner in which pertinent factors may be proved by requiring the exclusion of incompetent evidence. See *e.g. People v. Hamilton, supra,* 129-31, 32 Cal.Rptr. at 18-19, 383 P.2d at 426-27; *People v. Purvis,* 52 Cal.2d 871, 883-84, 346 P.2d 22 (1959).

Petitioner also argues that affording such wide latitude as to matters which may be presented on the issue of penalty is basically unfair since the "power of the prosecution to bring in evidence adverse to a defendant is much greater than the power of a defendant to obtain evidence that would help him or that would controvert the prosecution's evidence" (Pet. Br. 18). In this regard he refers to the reports and records retained by law enforcement, the reluct-

ance of witnesses to travel to another jurisdiction to testify for fear they will incur the possible ill will of local police officials, and the more favorable financial position enjoyed by the prosecution.

Just what significance these arguments have to the instant case is difficult to discern. The principal evidence presented during the penalty trial by the prosecution related to petitioner's assault upon Amanda Encinas in Mexico, an offense which occurred under circumstances remarkably similar to the Hodson murder. Proof by the prosecution was tendered not by police reports or records but by witnesses to the offense. The only use of records in this regard was by the defense which introduced the record of the Mexican court's disposition (RT 930-31). Although no witnesses to the event were presented by the defense other than petitioner himself, there is no suggestion in the record that this was because any potential witnesses were in fear of incurring the ill will of local law enforcement personnel.

Nor, does petitioner's statement that he, as an indigent defendant, was unable financially to bring witnesses from Mexico (Pet. Br. 19) find any support in the record. Indeed, the record does indicate that the public defender's office had sent two investigators down to Mexico (RT 610), and it further indicates that the trial judge expressed a willingness to pay the expenses of defense witnesses called in rebuttal to evidence presented by the prosecution concerning the Mexican assault (RT 654). Also, it should be noted that petitioner's brother, Willie Warren, appeared as

a defense witness (RT 945 et seq.), presumably from Michigan with expenses paid by the Court (see RT 651-52).

It is unreasonable to suggest that a sentencing body should be denied relevant and pertinent information simply because ordinarily the prosecution is more able financially to secure and present evidence. The important consideration is not that the defense and prosecution be equally situated from a standpoint of the resources available to them, but rather that the sentencing body have available to it the competent and relevant evidence it needs to assist it in making an intelligent determination.

III

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE THE CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE PRESENTS NO FEDERAL QUESTION.

Although petitioner lists a challenge to the sufficiency of the evidence as one of the questions he presents (Pet. Br. 9), it seems apparent from his brief that he makes no serious challenge to the conviction in this regard.

Although a conviction which is devoid of evidentiary support does not comport with due process of law (*Thompson v. Louisville*, 362 U.S. 199 (1960)), it is manifest that this case poses no such problem. The facts and circumstances as reflected in the record are not only sufficient to support the conviction, they compel the conclusion of guilt.

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the judgment of conviction and sentence in petitioner's case be affirmed.

Dated, San Francisco, California,
November 18, 1964.

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(Appendix A Follows)

Appendix A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Section 13, California Constitution:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court and to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have

power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide w[illegible] there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

Section 190.1, Penal Code of California:

"The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be

the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges the jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial of the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."